

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 29 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2009-0337-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
DAVID AUGUSTINE HIGDON,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20022359

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Creighton Cornell, P.C.  
By Creighton Cornell

Tucson  
Attorney for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, petitioner David Higdon was convicted of first-degree murder and armed robbery. The trial court sentenced him to natural life in prison for the murder and a concurrent, presumptive prison term of 15.75 years for the robbery. We affirmed Higdon's convictions and sentences on appeal. *State v. Higdon*, No. 2 CA-

CR 2005-0110 (memorandum decision filed May 25, 2006). In this petition for review, Higdon challenges the court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In what counsel labeled below a "partial petition for post-conviction relief," Higdon asserted multiple claims of trial error, prosecutorial misconduct, ineffective assistance of both trial and appellate counsel, and newly discovered evidence. The trial court summarily denied relief in an exhaustive minute entry ruling that addressed each of Higdon's "repetitious, inconsistent, and often conclusory arguments." Higdon has raised eleven issues on review, repeating most of his arguments below, also often in a conclusory manner, and at times misrepresenting or at least misinterpreting the court's ruling.

¶3 Contrary to Higdon's contentions on review, the trial court clearly identified, thoroughly analyzed, and correctly resolved all of the issues he had presented in his petition for post-conviction relief. To the extent Higdon contends the court applied the wrong standard in determining he was not entitled to an evidentiary hearing on some or all of his claims, we disagree. Higdon has taken out of context the court's statement that he "failed to meet his burden of showing by a preponderance of the evidence that any of his claims based on the existence of newly-discovered evidence are colorable." The court clearly articulated and obviously applied the correct standard in determining Higdon had "failed to raise a material issue of fact or law which would entitle him to an

evidentiary hearing.” *See* Ariz. R. Crim. P. 32.6(c) (“If the court, after identifying all precluded claims, determines that no remaining claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, the court shall order the petition dismissed” without an evidentiary hearing).

¶4 Higdon suggests the trial court improperly failed to address some of his arguments involving prosecutorial misconduct surrounding the testimony of witness Thompson, but the court correctly found Higdon’s claims of prosecutorial misconduct precluded because he had failed to raise them on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from relief on any ground waived on direct appeal). To the extent such claims were intertwined with his claims of newly discovered evidence, the court thoroughly addressed them. It also sufficiently addressed Higdon’s contention that appellate counsel had been ineffective for having failed to raise the issues on appeal. Further, to the extent Higdon claims the court improperly failed to “conduct[] a cumulative analysis of any prosecutorial misconduct claims or *Strickland* claims,” we also disagree. As noted, Higdon’s claims of prosecutorial misconduct were precluded, and the court found no merit to any related claims of newly discovered evidence or any of Higdon’s claims of ineffective assistance of counsel.

¶5 We find no abuse of discretion in the trial court’s ruling dismissing Higdon’s petition for post-conviction relief and no purpose in rehashing it here because it is readily understandable by any court in the future; thus, we approve and adopt the

ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

Although we grant Higdon's petition for review, we deny relief.

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ *J. William Brammer, Jr.*

J. WILLIAM BRAMMER, JR., Judge

/s/ *Garye L. Vásquez*

GARYE L. VÁSQUEZ, Judge